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No. 02-1703

Supreme Court, U.S.
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In The
Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE, et al.,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,

and

GALE NORTON, SECRETARY,
DEPT. OF INTERIOR, et al.,

and

STATE OF UTAH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

This case asks the Court to consider the manner in which federal courts may review agency "inaction" under the Administrative Procedure Act (the "APA"). The Court should grant the petition for certiorari to consider whether one may bypass "traditional" APA section 706(2) review of final agency action by framing theirs as an APA section 706(1) claim targeting agency "inaction." This case presents important jurisdictional issues that will not benefit from further activity in the lower courts. Circuit Courts split on the jurisdictional analysis, and the new approach created by the Tenth Circuit's decision here will dramatically expand and alter traditional APA jurisdictional review, with broad ramifications for executive branch administrative agencies, federal courts, and interested members of the public. This Court should hear this case to define and clarify the proper boundaries of APA section 706(1) review.

REASONS FOR GRANTING THE PETITION

A. The Important Public Issues Presented and Judicial and Administrative Economy Justify this Court's Review of the Decision Below.

Nothing about the procedural context of this case diminishes the need for this Court to offer guidance on the fundamental APA jurisdictional issues presented. Respondents argue this Court "has a long tradition" of refusing to hear cases "whose claims have not each been fully resolved by the lower courts." Br. in Op. 10. Respondents characterize the decision below as an interlocutory decision and suggest that further proceedings "may moot or narrow petitioners' concerns in this case." *Id.* at 11. These arguments are not correct.

This Court has often heard cases which were not fully or finally resolved in the lower courts. Respondents' concerns were considered and rejected in *Forsyth v.*

Hammond, 166 U.S. 506 (1897), in which Justice Brewer noted that the petition identified several conflicts, and concluded "although no final decree has been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment." *Id.* at 515. The Court further noted the power of certiorari "extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency. . . ." *Id.* at 514. Later decisions of the Court clarify that review of a nonfinal judgment is appropriate when the issue involved is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1944); see also *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-154 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 743 n.3 (1947). Several cases, including *Land* and *Larson*, involved procedural contexts strikingly similar to this case, in which trial court dismissals were reversed in the court of appeals and the case remanded for trial.

Additionally, the Court has often, without specifically mentioning the "fundamental to further conduct" rationale, granted certiorari to consider important issues presented through cases involving circuit court reversals of district court dismissals. *California Brewers Assoc. v. Bryant*, 444 U.S. 598, 601 (1980) (petition granted "to consider the important question presented under Title VII of the Civil Rights Act of 1964"); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 536 (1978) (petition granted "[t]o resolve the conflicting interpretations of [Sherman Act] adopted by several Courts of Appeals"); *Butz v. Economou*, 438 U.S. 478, 480-481 (1978) (certiorari granted in case involving governmental immunity "[b]ecause of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government . . ."). The Court certainly has discretion to grant the petition(s) and review the Tenth Circuit's decision here.

This case fits well within the cases outlined above and there are numerous reasons why the Court should grant certiorari here. The rights at issue are certainly public rights, framed in the geographical context of the Nation's diverse and voluminous public lands. The APA principles at issue are of even broader importance, because the APA provides the jurisdictional starting point for nearly all judicial review of agency action, since "there is hardly ever any need for Congress" to create "a private right of action against the *federal* government. . . ." *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 152 (1st Cir. 1987) (italics in original); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990) (explaining that where there is "no specific authorization in the substantive statute" review proceeds under the APA). As pointed out by Petitioners here and in Nos. 03-101, 03-109, and 03-123, there is substantial confusion, if not direct conflict, between varied circuit and district courts over the correct treatment of the APA section 706(1) cause of action.

There is little question that resolution of this issue is "fundamental to further conduct of the case." Respondents contend that this case below has involved only "a subset" of their claims and that a broad range of "plausible outcomes" below militate against review in this case. Br. in Op. 12. None of these concerns should preclude review here; Respondents only propose to apply the same jurisdictional template to different permutations of the 23 million acres of BLM-managed lands in Utah targeted by their complaint. Br. in Op. App. 33, ¶ 12. None of these possible variations[1] will eliminate the need for guidance from this

[1] Respondents complain that their claims were dismissed "at such an early stage" by the district court. Br. in Op. 11. In reality, the district court allowed Respondents six days of evidentiary hearings and a seventh day of oral argument in prosecuting the motions in question. See Pet. 9. The procedures adopted by the district court were far more elaborate than those employed in a typical public lands "record review"

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Court on the proper interpretation of APA section 706(1) jurisdiction.

Finally, it would disserve judicial and administrative economy for this Court to delay review. As explained in the Petitition(s) here and in No. 03-123, the Tenth Circuit's decision and the Ninth Circuit's decision in *Montana Wilderness Assoc. v. U.S. Forest Service*, 314 F.3d 1146 (9th Cir. 2003), are already being applied to allow expanded review of ongoing agency activity under APA section 706(1). Respondents are not presented with a "jurisdictional vacuum" in which BLM's numerous decisions affecting vehicle access are immune from review; they are hoping to utilize section 706(1) to leverage more desirable agency activity through the long-running and ill-defined judicial review allowed by the Tenth Circuit's decision. If allowed to proceed on its present course, this case could last several more years before the district and circuit courts render the "full" and "final" resolution that Respondents would require as a prerequisite to certiorari. Such development will not alter the need for guidance from this Court on the nature of section 706(1) review. Rather than forcing the parties to endure multiple presentations of the identical issues below, it far better serves the interests of all involved to grant review here to better define the nature of judicial review of agency inaction.

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case under the APA. See, e.g., *Florida Power & Light Co v. Lorion*, 470 U.S. 729, 743-744 (1985) (explaining focal point for judicial review is administrative record relied upon by agency); *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1175 (9th Cir. 2000) (example of APA section 706(2) case resolved on cross-motions for summary judgment drawing from the "voluminous record").

B. The Decision Below is Inconsistent, if Not in Conflict, with Decisions of this Court and Other Circuits.

The Tenth Circuit's decision cannot be squared with prior decisions of this Court and other Circuit Courts of Appeals. Respondents' attempts to distinguish *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) and *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) are unpersuasive. Respondents argue that these cases involved "sweeping programmatic claims" as opposed to the "site-specific legal violations" targeted by Respondents. Br. in Op. 15. However, Respondents ignore the basic unifying factors: each case focuses on broad geographic areas and broad legal duties, *not* on any discrete *final agency action* applying the legal duty to the broad geographic area targeted in the complaint. *Lujan* counsels, at least where the agency has acted on the duty at issue, that a focus on "a specific 'final agency action' [that] has an actual or immediately threatened effect . . ." is the "traditional . . . and normal, mode of operation of the courts." *Lujan*, 497 U.S. at 894.

Respondents largely ignore the Ninth Circuit decisions in *ONRC Action v. BLM*, 150 F.3d 1132 (9th Cir. 1998) and *Ecology Center v. U.S. Forest Service*, 192 F.3d 922 (9th Cir. 1999). Respondents erroneously suggest the Ninth Circuit's recent decision in *Montana Wilderness* rejected *Ecology Center's* "genuine failure to act" rule. Br. in Op. 16 n.8. *Montana Wilderness'* cursory discussion certainly does not explicitly overrule *Ecology Center*. *Montana Wilderness* offers no meaningful guidance between a challenge to the sufficiency of action taken "dressed up" as a failure to act and a proper challenge to "partial" action on a mandatory legal duty. The D.C. Circuit Court of Appeals employed the same reasoning as *Ecology Center* to affirm dismissal of section 706(1) challenges reflecting "nothing more than substantive disagreement with the agency's legal rulings." *Assoc. of Civilian Technicians v. Federal Labor Relations Authority*,

283 F.3d 339, 344 (D.C. Cir. 2002). Finally, Respondents entirely omit any reference to *ONRC Action*, in which the Ninth Circuit affirmed a district court dismissal of a section 706(1) claim based on a "nondegradation" duty structurally identical to the "nonimpairment" duty in this case, finding that the duty in question was not the type of "clear statutory duty" subject to a proper section 706(1) claim. *ONRC Action*, 150 F.3d at 1139 and n.7.

Respondents finally argue that their case is distinguishable because they will be deprived of any opportunity to challenge "BLM's violation of the nonimpairment requirement in the context of an affirmative challenge to an agency action." Br. in Op. 17. This statement is incorrect. *All* vehicle access on Utah BLM lands flows from *some* agency decision. Contrary to Respondents' implication, there is no general presumption allowing cross-country, or any, vehicular access. BLM authorizes and restricts vehicle access through a public planning process. 43 C.F.R. part 8340. Respondents may now be dissatisfied with their failure to challenge *past* decisions to authorize use, and are sufficiently experienced to understand the difficulty of succeeding in a section 706(2) "arbitrary and capricious" challenge to the agency's chosen balance in decisions such as the San Rafael Route Designation Plan or the Coral Pink Sand Dunes Management Plan. Rather than identifying the absence of an opportunity for judicial review of BLM's vehicle access decisions, Respondents hope through section 706(1) to create a new, broader and easier method of review.

C. Respondents' Jurisdictional Vision Would Dramatically Expand APA Review.

Respondents' view, now endorsed by the Tenth Circuit, would allow creative private interests to subject federal land management agencies to perpetual litigation challenging the agencies' failures to take "complete" action on broad and discretion-laden duties. Such is not the result of "unexceptional" application of textbook APA principles, but

would represent a profound "paradigm shift" in the relationship between the judiciary and executive branch agencies.

Respondents cite several decisions in arguing that theirs is an "unexceptional" challenge comparable to "the many analogous cases in which courts have considered inaction claims under the APA." Br. in Op. 22. The citations to *Montana Wilderness* and *Center for Biological Diversity v. Veneman*, 335 F.3d 849 (9th Cir. 2003) provide little support, for these recent decisions rely for support on the decision under review or are themselves the subject of petitions for certiorari. Careful analysis of the remaining decisions reveals they are distinguishable and only amplify the confusion surrounding section 706(1) and the resulting need for guidance from this Court. First on this list is *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987). *NAACP* must be considered in light of the unique statutory language at issue, in which Congress specifically directed the Department of Housing and Urban Development must act "in a manner affirmatively to further" the policies of the Fair Housing Act. *Id.* at 151. More importantly, the First Circuit's decision seemingly turns on the analogy to cases finding section 706(1) can be used to compel an official " 'to exercise his discretion where he has obviously failed or refused to do so.' " *Id.* at 160 (quoting *Mastrapasqua v. Shaughnessy*, 180 F.2d 999, 1002 (2d Cir. 1950)). Thus, *NAACP* only reaffirms the principle that section 706(1) can be used to challenge a total failure to act, but offers no guidance on the central issue of this case, namely, whether allegations that an agency has only *partially* discharged a statutory duty can constitute a viable section 706(1) claim.

This distinction covers the bulk of Respondents' "many analogous cases." For instance, *Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985) is clearly a "total inaction" instead of a "partial inaction" case, for the court there compared the situation at issue to "the Secretary's failure to implement a program entirely, not simply his failure to

grant aid in a particular case . . ." and "regard[ed] this fact as the essential point distinguishing . . . *Heckler v. Chaney*, 470 U.S. 821 (1985). . . ." *Id.* at 350 and n.2. Similarly, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) involved allegations that the agency "has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty." *Id.* at 1162. Such is also the case with *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1181 (10th Cir. 1999), in which the Secretary of Interior admitted the agency failed to designate *any* critical habitat by the deadline established by the Endangered Species Act. Finally, Respondents' cited section of *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984) only endorses judicial intervention via section 706(1) when an agency has utterly abdicated a statutory duty to act or is "lag[ging] unreasonably" in reaching *any* decision. *Id.* at 32. *Public Citizen* involved a challenge to FDA's failure to reach any decision on a petition alleging aspirin products must carry a warning about Reye's Syndrome. Despite the agency's failure to take timely action, the D.C. Circuit Court of Appeals actually held that "respect for the integrity of the administrative process . . . precludes judicial review, prior to a definitive agency resolution" of the petition. *Id.* at 35. In short, none of these cases add anything beyond the rule summarized in *Ecology Center v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999), requiring a proper section 706(1) claim to target a "genuine failure to act."

There is no "genuine failure to act" in this case. With regard to their "land use plan commitment" claims Respondents admit that the "delayed" or "withheld" actions *have been performed.* Br. in Op. 6 n.2; Br. in Op. 18 n.11. On these claims, there is no agency action to "compel" and dismissal should be, and was, appropriate just as it was for the monitoring-focused claims of *Ecology Center*.

BLM similarly has long acted, and continues acting, on Respondents' "nonimpairment" claims. Respondents

candidly admit "that BLM has taken *some* final actions concerning ORV use somewhere in Utah – mostly in response to this lawsuit. . . ." Br. in Op. 17 n.9 (italics in original); see also, Pet. Br. 18-19 (discussing BLM actions to restrict vehicle access in areas at issue). Respondents specifically mention the existence of the relatively recent San Rafael Route Designation Plan which "determine[s] which routes will be closed and which will be open . . .," acknowledge that Plan closes 468 miles of routes while designating 677 miles as open, and note the decision is "final agency action" subject to "arbitrary and capricious" review under APA section 706(2). Br. in Op. 19 and n.12. Rather than using section 706(1) to create unprecedented and ongoing judicial oversight over BLM's management efforts Respondents should pursue any continuing disagreements with BLM through the "traditional, and . . . normal, mode of operation of the courts" by challenging final agency action. *Lujan*, 497 U.S. at 894; *Ohio Forestry v. Sierra Club*, 523 U.S. 726, 735 (1998). None of the cases cited by Respondents allow one to use APA section 706(1) to challenge active and ongoing agency efforts toward compliance with broad, multiple-use statutory duties.

If Respondents are correct any section 706(1) claim survives jurisdictional scrutiny if framed as a challenge to "partial" compliance with a statutory duty. Until the Tenth Circuit's decision here and the Ninth Circuit's decision in *Montana Wilderness* no court has adopted Respondents' interpretation of section 706(1). At most, Respondents' cited authority demonstrates the confusion in the lower courts and provides fodder for presenting the merits of this case to the Court. This Court should grant certiorari to consider the important and timely questions concerning the proper nature of APA section 706(1) review.

CONCLUSION

For the reasons stated above, and in the petitions for writ of certiorari in this matter and in No. 03-101, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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